UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**CRIMINAL NO. 95-59-P-H**
	)	**(CIVIL NO. 99-144-P-H)**
PAUL J. CAVALLARO,	)	
	)	
DEFENDANT	)	

ORDER REJECTING RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The question in this case is when the statute of limitations begins to run for attacking a federal sentence when previous state convictions that enhanced the federal sentence are later vacated by a state court. I conclude that under 28 U.S.C. § 2255, the one-year limitation period starts to run when the state sentences are *vacated,* not some earlier date when the defendant comes into possession of facts that furnish the basis for attacking the state sentences.

On June 2, 1997, I sentenced Paul Cavallaro. I sentenced him as a career offender because of certain 1991 Massachusetts state convictions. At the federal sentencing, Cavallaro and the government stipulated to a downward departure —which I approved—on the grounds that his Criminal History score over represented the seriousness of his actual criminal history. But Cavallaro preserved in writing his right to challenge the Massachusetts convictions and then seek relief under 28 U.S.C. § 2255.[1] See Agreement at ¶ 5 (Docket Item 57). The government preserved its right to

[1] The Supreme Court has made clear that an attack on state convictions cannot be presented to the federal sentencing court. See Custis v. United States, 511 U.S. 485 (1994) (precluding a defendant from using the federal sentencing forum to challenge the underlying state conviction unless the attack is based (continued...)

contest such a challenge. See Tr. of Proceedings at 13, ll 17-21 (Docket Item 73). On March 9, 1999, Cavallaro's Massachusetts convictions were vacated by a Massachusetts state court. On May 4, 1999, Cavallaro filed his section 2255 motion attacking his federal sentence. The government says he was too late.

Section 2255 provides that a defendant may seek relief within one year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." See 28 U.S.C. § 2255(4) (West Supp. 1999). Under its plain language, Cavallaro's motion is timely. The "claim" he presents here is that he is not a career offender. The "facts" supporting that claim is the Massachusetts court decision of March 9, 1999, vacating the Massachusetts convictions. The elimination of the Massachusetts convictions was not discoverable until March 9, 1999.[2]

The government is correct that Cavallaro possessed facts that would support his challenge to the Massachusetts convictions well over a year before he filed his federal motion. But Cavallaro's claim in this court is not the claim that the Massachusetts convictions were invalid and had to be vacated or set aside. The only claim that Cavallaro could bring here was the claim that the

[1] (...continued)
upon the lack of legal counsel).

[2] I will not re-write the statute to change the phrase "could have been discovered" to "could have been engineered" or "could have been brought about."

convictions no longer existed.[3] That "fact" did not emerge until March 9, 1999.[4] Indeed, at first the Massachusetts court *refused* to vacate the conviction. See Tr. of Hr'g on Petitioner's Section 2255 Motion, Gov't Ex. 1 (handwritten denial of Mot. for New Trial by Gelinas, J., dated Jan. 14, 1999). Certainly as of that time, Cavallaro had no claim to present to the federal sentencing court. Only when the Massachusetts court changed its position on March 9, 1999, and vacated the convictions did Cavallaro have a claim under section 2255.

The government reasonably argues that in revising the statute in 1996, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I § 105, 110 Stat. 1220 (codified as amended at 28 U.S.C. § 2255), Congress was trying to limit the time for attacking federal sentences. The reading of the statute I endorse seems perversely to permit federal defendants to proceed as leisurely as they choose in attacking their state sentences, confident that they still have a year to attack their federal sentences. There are several responses. First, section 2255's language is plain[5]; second, the argument assumes that state courts will be glad to tolerate such leisure and nevertheless grant late relief. Third and most importantly, it ignores the fact that Congress and the

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[3] Perhaps under Custis, 511 U.S. at 497, Cavallaro could have attacked his Massachusetts convictions in federal court (petitioner could attack underlying Maryland sentence "in Maryland or through federal habeas review"), but the challenge would lie against state defendants in the District of Massachusetts whereas this section 2255 lawsuit must be against the federal government in the District of Maine before me, the sentencing judge.

[4] This is what distinguishes Cavallaro's claim from the decision in Fraser v. United States, 47 F. Supp. 2d 629 (D. Md.), appeal dismissed, 188 F.3d 504 (4th Cir. 1999) (per curiam) (unpublished). There, what the defendant knew for more than a year was that his civil rights had been restored by Wisconsin authorities; that fact—the restoration of civil rights—was the basis for his claim that his federal sentence, based on the assumption that his civil rights had not been restored, was improper. The "fact"—restoration—was more than a year old, unlike the Massachusetts decision vacating Cavallaro's Massachusetts convictions.

[5] I observe that analogously under the statute a United States Supreme Court decision that is retroactive also opens the one-year limitation period. See 28 U.S.C. § 2255(3) (West Supp. 1999).

Sentencing Commission have chosen to make federal sentences depend mechanically upon state sentences. The cost of this approach, whatever its benefits, is that the federal sentences are as fragile as their state sentence underpinnings.

It is true that at sentencing I told Cavallaro that he had to bring his section 2255 motion within a year. See Tr. of Proceedings at 21, ll 9-14 (Docket Item 73). I did that after the lawyers brought the written agreement to my attention and told me their interpretation. My statement to Cavallaro, however, could not change his statutory rights under section 2255. It is Cavallaro's section 2255 rights that he preserved in the written agreement. Under section 2255, his motion was timely filed.

The question remains, however, what relief is available. The government tells me that Massachusetts prosecutors might decide to reprosecute and that, if they obtain a new conviction, Cavallaro will remain a career offender. Without deciding whether that is a correct statement of the law, I observe that the Massachusetts decision was rendered on March 9, 1999. A year should be sufficient time for the Massachusetts authorities to decide whether to reprosecute. Unless the government files proof by March 9, 2000, that a Massachusetts prosecution is proceeding with alacrity, the matter shall be scheduled for resentencing. As the Magistrate Judge found, that is the message of Custis, 511 U.S. at 497 (recognizing that a defendant may reopen his federal sentencing enhancement if the underlying state convictions are overturned) and United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (endorsing Custis).

The Magistrate Judge's Recommended Decision denying the defendant's motion to vacate, set aside or correct his sentence is **REJECTED**.

SO ORDERED.[6]

DATED THIS 9TH DAY OF FEBRUARY, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

[6] I am not relying upon the extension of time the defendant obtained from this Court, an extension the government argues was ineffective.